

1 Approximately forty-five minutes later, a Reno patrolman saw one person driving a
2 truck matching the description of the VW speeding toward Pyramid Lake.

3 That evening, Petrocelli was picked up on the Pyramid Highway and given a
4 ride to Sutcliffe. He told the driver that his motorcycle had broken down. In Sutcliffe,
Petrocelli got a ride to Sparks with a local game warden. Petrocelli then took a cab to
Reno and apparently paid his fare from a two-inch roll of bills.

5 The next day, the game warden and his partner looked for Petrocelli's
6 motorcycle. Instead, they found the VW truck with bloodstains and bullet holes on
the passenger side. The car dealer's body was found later that day in a crevice,
7 covered with rocks, sagebrush and shrubbery. His back pockets were turned slightly
inside out and empty; his wallet was missing. The victim, who usually carried large
8 amounts of cash with him, had been shot three times with a .22 caliber weapon. One
shot was to the neck; another shot was to the heart. The third shot was to the back of
9 the head from a distance of two to three inches.

10 In the abandoned truck, .22 caliber bullet casings were found. When he was
arrested, Petrocelli was carrying a .22 caliber semi-automatic pistol which he testified
11 he always carried loaded and ready to fire. Ballistics tests on the casings found in the
abandoned VW revealed that they had been fired from Petrocelli's pistol. Tests on the
12 bullet found in Wilson's chest and a test bullet fired from Petrocelli's pistol also
revealed similar markings.

13 At trial, Petrocelli provided his own account of the killing. After driving off
the car lot, the car dealer stopped at a gas station and filled the truck. From the
14 station, Petrocelli drove the truck. He and Wilson proceeded to argue about the price
of the truck. Petrocelli laid \$3,500.00 on the dashboard and offered a total of
15 \$5,000.00 cash. The car dealer was insulted and called him a "punk." Later, on the
way back, Wilson twice grabbed for the steering wheel. Petrocelli then pulled out his
16 pistol and said: "Now who is the punk." The victim laughed and said he had a gun
also, although Petrocelli never saw one. The car dealer tried to take the pistol from
17 Petrocelli as he continued to drive. As they struggled, the gun went off two or three
times. Petrocelli testified, "I knew it was shooting, and I was just trying to pull it
18 away from him.... It was an accident. It was an accident. I didn't do anything. I just
tried to keep him from getting the gun." Petrocelli drove to a nearby doctor's office,
19 went up to the door, but did not go in because he "didn't know how to tell him
[doctor] there was someone hurt, shot in the car." Thereafter, Petrocelli went to a
20 bowling alley and called the hospital, but "didn't know what to say." He then returned
to the truck, drove to Pyramid Lake and hid the car dealer's body under some rocks.
21 Petrocelli began walking after his truck bogged down, but then returned to the vehicle
to retrieve his gloves and the gun. He also picked up the car dealer's wallet, took his
22 money, threw the business and credit cards into the wind, and discarded the wallet.
Petrocelli then walked to the highway where he obtained rides back to Reno.

23
24 *Petrocelli v. State*, 101 Nev. 46, 48-49, 692 P.2d 503, 505-06 (1985) (emendations in original).

1 Petrocelli was convicted by a jury of first degree murder and robbery with the use of a deadly
2 weapon. *See* Exhibits 4, 5 (ECF No. 163-2, pp. 12-17).¹ He was sentenced to death for the murder,
3 and to thirty years in prison for the robbery. *See id.*

4 Petrocelli appealed. *See* Exhibit Z (ECF No. 75-1, pp. 117-64) (opening brief); Exhibit AA
5 (ECF No. 76, pp. 2-49) (answering brief); Exhibit BB (ECF No. 76, pp. 50-75) (reply brief). The
6 Nevada Supreme Court affirmed on January 4, 1985. *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503
7 (1985); *see also* Exhibit 9 (ECF No. 163-3, pp. 1-27). Petrocelli's petition for rehearing was denied
8 on March 19, 1985. Exhibit II (ECF No. 118-19).

9 On August 12, 1985, Petrocelli filed a petition for post-conviction relief in the state district
10 court. Exhibit H (ECF No. 70-2, pp. 72-81). On March 20, 1985, the state district court held an
11 evidentiary hearing. Exhibit Y (ECF No. 75, p. 133 - ECF No. 75-1, p. 115) (transcript). On
12 December 31, 1986, the state district court denied the petition. Exhibit I (ECF No. 70-2, p. 138 -
13 ECF No. 70-3, p. 8). Petrocelli appealed. Exhibit JJ (ECF No. 76, pp. 121-42 (opening brief);
14 Exhibit KK (ECF No. 76, p. 143 - ECF No. 76-1, p. 31) (answering brief); Exhibit LL (ECF No.
15 76-1, pp. 32-49) (reply brief). On June 23, 1988, the Nevada Supreme Court dismissed the appeal.
16 Exhibit NN (ECF No. 76-1, pp. 51-56).²

17 On August 24, 1988, Petrocelli filed a petition for writ of habeas corpus in this court,
18 initiating the case of *Petrocelli v. Whitley*, CV-N-88-0446-HDM.³ Exhibit 16 (ECF No. 164, pp.
19 2-17). Counsel was appointed to represent petitioner. *See* Exhibits 2 and 5 to Respondents'

22 ¹ Unless otherwise noted, the exhibits identified by numbers in this order were filed by
23 Petrocelli, and are located in the record at ECF Nos. 163 through 169. And, unless otherwise noted, the
24 exhibits identified by letters in this order were filed by respondents, and are located in the record at
ECF Nos. 36 and 70 through 76.

25 ² The court refers to this state-court proceeding as Petrocelli's "first state habeas action."

26 ³ The court here uses its older system of file numbers to identify Petrocelli's first federal habeas
action. Using the court's current file number system, that case would be identified as *Petrocelli v.*
Whitley, 3:88-cv-0446-HDM.

1 February 7, 1997 Filing (ECF No. 55).⁴ On May 31, 1989, upon a motion by Petrocelli, the court
2 ordered his first federal habeas action, case number CV-N-88-0446-HDM, dismissed without
3 prejudice, to allow him to return to state court to further exhaust his claims. *See* Exhibits 6, 7, 8, 9,
4 10, and 11 to Respondents' February 7, 1997 Filing.

5 On March 10, 1989, Petrocelli filed a petition for writ of habeas corpus in state district
6 court. Exhibit PP (ECF No. 36, pp. 19-26). The state district court dismissed that petition on
7 January 22, 1992. Exhibit UU (ECF No. 36, pp. 109-23). Petrocelli appealed. *See* Exhibit WW
8 (ECF No. 36, p. 125 - ECF No. 36-1, p. 38) (opening brief); Exhibit XX (ECF No. 36-1, pp. 40-94)
9 (answering brief); Exhibit YY (ECF No. 36-1, pp. 95-104) (reply brief). The Nevada Supreme
10 Court dismissed the appeal on December 22, 1993. Exhibit ZZ (ECF No. 36-1, p. 106 - ECF No.
11 36-2, p. 1).⁵

12 Petrocelli then initiated this, his second, federal habeas corpus action, on July 13, 1994.
13 He filed the original petition for writ of habeas corpus in this action on October 28, 1994 (ECF No.
14 4). Counsel was appointed for Petrocelli (ECF Nos. 7, 8, 24). On February 9, 1996, Petrocelli filed
15 a first amended habeas petition (ECF No. 28).

16 Respondents then filed a motion to dismiss, arguing that certain claims in the first amended
17 petition were unexhausted, procedurally barred, and constituted an abuse of the writ (ECF No. 36).
18 The court granted that motion, in part, and dismissed five claims from the first amended petition
19 (ECF Nos. 46, 56). In a subsequent order, entered September 30, 1997, the court denied the first
20 amended habeas petition, ruling that certain claims in it were an abuse of the writ and that certain
21 claims were procedurally defaulted, and denying the remainder of the claims on their merits
22 (ECF No. 78). Judgment was entered (ECF No. 79).

24 ⁴ On February 7, 1997, in this case, respondents filed a document entitled: "Response to
25 Petitioner's Explanation Why Grounds 26, 27, 28, 6 and 9 Should Not Be Barred As An Abuse of the
26 Writ" (ECF No. 55) ("Respondents' February 7, 1997 Filing"). Attached to that document are eleven
exhibits, which are copies of documents filed in *Petrocelli v. Whitley*, CV-N-88-0446-HDM.

⁵ The court refers to this state-court proceeding as Petrocelli's "second state habeas action."

1 Petrocelli appealed (ECF No. 80). On March 8, 2001, the court of appeals affirmed in part,
2 reversed in part, and remanded. *Petrocelli v. Angelone*, 248 F.3d 877 (9th Cir.2001) (copy of
3 opinion in record at ECF No. 88). The court of appeals affirmed this court's denial, on the merits, of
4 certain of Petrocelli's claims, and reversed this court's determinations that certain claims were an
5 abuse of the writ and that certain claims were procedurally defaulted. *Id.* The court of appeals
6 remanded for further proceedings. *Id.*

7 Following the remand, the district court heard from the parties regarding the status of the
8 remanded claims, with respect to the exhaustion of those claims in state court (*see* ECF Nos. 92, 93,
9 94, 97, 98, 99, 101). In an order entered February 7, 2003 (ECF No. 100), the court ruled that the
10 remanded claims were "mixed," meaning that some of them had been exhausted in state court and
11 some had not. The court extended to Petrocelli the opportunity to amend his petition to remove the
12 unexhausted claims, and exhaust those claims in state court during a stay of this action. Petrocelli
13 opted to take that course: he filed a second amended petition (ECF No. 104), and then, to correct
14 typographical errors, a third amended petition (ECF No. 108), and on May 28, 2003, the court
15 ordered this action stayed pending Petrocelli's exhaustion of claims in state court (ECF No. 109).

16 On August 11, 2003, Petrocelli filed a petition for writ of habeas corpus in the state district
17 court. Exhibit 26 (ECF No. 165, pp. 2-43). Petrocelli later filed a supplement to that petition.
18 Exhibit 32 (ECF No. 165-3, pp. 80-93). The state district court held evidentiary hearings. Exhibits
19 29, 30, 31 (ECF No. 165-2, and ECF No. 165-3, pp. 2-78) (transcripts). The petition was denied and
20 dismissed by the state district court on April 14, 2006. Exhibit 36 (ECF No. 166, pp. 30-40).
21 Petrocelli appealed. *See* Exhibit 38 (ECF Nos. 166-2, 166-3) (opening brief); Exhibit 39 (ECF No.
22 166-4) (answering brief); Exhibit 40 (ECF Nos. 166-5, 167) (reply brief). The Nevada Supreme
23 Court affirmed on July 26, 2007. Exhibit 41 (ECF No. 167-2, pp. 2-15).⁶

24 On November 16, 2007, upon a motion by Petrocelli, the stay of this action was lifted
25 (ECF No. 147). On January 11, 2009, Petrocelli filed his fourth amended petition for writ of habeas
26

⁶ The court refers to this state-court proceeding as Petrocelli's "third state habeas action."

1 corpus (ECF No. 162). The fourth amended petition is now Petrocelli's operative petition. It
2 includes 31 claims for habeas corpus relief, including several with subparts.

3 On May 26, 2009, respondents filed a motion to dismiss (ECF No. 173). The court ruled on
4 that motion on March 23, 2010 (ECF No. 200), granting it in part and denying it in part. The court
5 dismissed Grounds 1, 2, 3, 4, 5, 6(a), 6(b), 7(a), 7(c), 7(d), 8(a), and 8(c), of Petrocelli's fourth
6 amended petition. *See* Order entered March 23, 2012 (ECF No. 200), p. 37. In addition, the court
7 found the following claims to be unexhausted in state court: Grounds 7(e), 8(b), 9, 11, 14, 15(a),
8 15(b), 15(c), 15(d), 15(e), 16(a), 16(b), 16(c), 16(d), 16(e), 16(f), 16(g), 16(h), 16(i), 17, 18, 19, 20,
9 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, and 31. *Id.* at 37-38. With respect to the unexhausted claims,
10 the court ordered that Petrocelli was to abandon those claims, make a motion for a stay of this action
11 to allow him to return to state court to exhaust those claims, or face dismissal of his entire action
12 under *Rose v. Lundy*, 455 U.S. 509 (1982).

13 On April 20, 2010, Petrocelli filed a motion for reconsideration, requesting that the court
14 reconsider the dismissal of Grounds 3 and 4 (ECF No. 201). The court denied that motion in an
15 order entered on August 10, 2010 (ECF No. 209).

16 On April 21, 2010, Petrocelli filed a motion for stay, requesting that this federal action be
17 stayed again while he returns to state court to exhaust his unexhausted claims (ECF No. 203). The
18 court denied the motion for stay in an order entered on March 10, 2011 (ECF No. 218).

19 On April 6, 2011, Petrocelli filed a motion for reconsideration, asking the court to reconsider
20 its denial of his motion for stay (ECF No. 220). The court denied that motion for reconsideration on
21 October 5, 2011 (ECF No. 224).

22 Petrocelli then filed a motion (ECF No. 225) requesting permission to appeal the denial of
23 the motion for stay. Petrocelli also filed, in the court of appeals, a petition for extraordinary writ of
24 mandamus, contesting the denial of that motion, as well as an emergency motion for stay pending
25 determination of the petition for a writ of mandamus. *See* Notice of Filings, filed October 31, 2011
26 (ECF No. 226). On November 3, 2011, the court of appeals denied the petition for writ of mandamus

1 and the emergency motion for stay (ECF No. 227). On December 7, 2011, the court denied the
2 motion requesting permission to appeal (ECF No. 231).

3 On November 4, 2011, Petrocelli filed a notice of abandonment of unexhausted claims,
4 abandoning the claims held by the court to be unexhausted (ECF No. 228). This left, in the fourth
5 amended petition, the following claims to be resolved on their merits: Grounds 6(c), 6(d), 7(b), 7(f),
6 10, 12, and 13.

7 Respondents filed an answer (ECF No. 239), responding to the remaining claims in the
8 fourth amended petition, on April 3, 2012. Petrocelli filed a reply on July 18, 2012 (ECF No. 245).

9 Standard of Review

10 Petrocelli's federal habeas corpus action was initiated, and his original habeas corpus
11 petition filed, prior to enactment of the Antiterrorism and Effective Death Penalty Act of 1996
12 ("AEDPA"). See *Petition for Writ of Habeas Corpus* (ECF No. 4), filed October 28, 1994.
13 Therefore, pre-AEDPA standards apply. *Lindh v. Murphy*, 521 U.S. 320, 322-23 (1997).

14 Respondents argue that, because the operative amended habeas petition, Petrocelli's fourth
15 amended petition, was filed after the enactment of AEDPA, the standard of review imposed by
16 AEDPA should apply. See *Answer* (ECF No. 239), pp. 15-24. That argument, however, runs
17 contrary to Ninth Circuit precedent. See *Thomas v. Chappell*, 678 F.3d 1086, 1100-01 (2012), *cert.*
18 *denied*, 133 S.Ct. 1239 (2013). In *Thomas*, the court of appeals stated:

19 We have consistently held that where, as here, a petitioner filed a habeas application
20 before the effective date of AEDPA and the district court retained jurisdiction over
21 the case, AEDPA does not apply even if the petitioner files an amended petition after
the effective date of AEDPA.

22 *Thomas*, 678 F.3d at 1100; see also *Sivak v. Hardison*, 658 F.3d 898, 905 (9th Cir. 2011 (applying
23 pre-AEDPA standards where initial petition was filed prior to AEDPA's enactment and amended
24 petition was filed after AEDPA's enactment); *Allen v. Roe*, 305 F.3d 1046, 1049 & n.1 (9th Cir.
25 2002) (same); *Robinson v. Schriro*, 595 F.3d 1086, 1098-99 (9th Cir.), *cert. denied*, 131 S. Ct. 566
26 (2010) (same); *Hamilton v. Ayers*, 583 F.3d 1100, 1105 (9th Cir.2009) (same); *Jackson v. Brown*,

1 513 F.3d 1057, 1068-69 (9th Cir.2008) (same). The court, therefore, applies pre-AEDPA standards
2 to Petrocelli's claims.

3 Applying pre-AEDPA standards, the court reviews questions of law, and mixed questions of
4 law and fact, de novo, with no deference to the state court's legal conclusions. *Williams v. Taylor*,
5 529 U.S. 362, 400 (2000); *Dubria v. Smith*, 224 F.3d 995, 1000 (9th Cir.2000) (en banc); *McKenzie*
6 *v. McCormick*, 27 F.3d 1415, 1418 (9th Cir.1994) (en banc). A petitioner "must convince the
7 district court 'by a preponderance of evidence' of the facts underlying the alleged constitutional
8 error." *McKenzie*, 27 F.3d at 1418-19 (citing *Johnson v. Zerbst*, 304 U.S. 458, 469 (1938), and
9 *Bellew v. Gunn*, 532 F.2d 1288, 1290 (9th Cir.1976)). The court presumes "that the state court's
10 findings of historical fact are correct and defer[s] to those findings 'in the absence of convincing
11 evidence to the contrary' or a demonstrated lack of 'fair support in the record.'" *Mayfield v.*
12 *Woodford*, 270 F.3d 915, 922 (9th Cir.2001) (en banc).

13 Analysis

14 Ground 6(c)

15 In Ground 6(c) of his fourth amended petition, Petrocelli claims that his constitutional rights
16 were violated "due to the failure of trial counsel to provide reasonably effective assistance at the
17 guilt/innocence phase of his trial," "for failing to object to the admission of the handgun." Fourth
18 Amended Petition (ECF No. 162), pp. 144, 150.

19 In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court propounded a two
20 prong test for analysis of claims of ineffective assistance of counsel: a petitioner claiming
21 ineffective assistance of counsel must demonstrate (1) that his attorney's representation "fell below
22 an objective standard of reasonableness," and (2) that the attorney's deficient performance
23 prejudiced the defendant such that "there is a reasonable probability that, but for counsel's
24 unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S.
25 at 688; *see also id.* at 694. "A reasonable probability is a probability sufficient to undermine
26 confidence in the outcome." *Id.* at 694.

Petrocelli presented this claim to the Nevada Supreme Court on his appeal from the dismissal of his second state habeas petition. *See* Appellant's Opening Brief, Exhibit WW, pp. 9-13. In its order dismissing Petrocelli's appeal, the Nevada Supreme Court stated the following:

Petrocelli was arrested by a SWAT team in his home, taken outside and handcuffed. The police then performed a protective sweep of the house during which time they found a pistol in a flight bag in the bedroom closet. The pistol was later determined to be the murder weapon. At trial, the State offered the murder weapon into evidence without objection from Petrocelli's counsel. Petrocelli now claims that the seizure of the murder weapon violated the United States Supreme Court's standards for protective sweeps in *Maryland v. Buie*, 494 U.S. 325 (1990), and adopted by this court in *Hayes v. State*, 106 Nev. 543, 797 P.2d 962 (1990). He maintains that the trial testimony of the arresting officers did not show the specific and articulable grounds necessary to support a reasonable belief that there was someone in the house posing a danger to the officers. In addition, he contends that the murder weapon was not in plain view, thus necessitating a search warrant.

The seizure of the murder weapon was arguably unlawful. The search of a flight bag in a closet was not within the realm of a protective sweep. Therefore, Petrocelli's counsel should have objected to the admission of the murder weapon. However, even though trial counsel's failure to object possibly fell below an objective standard of reasonableness, the requisite prejudice is not present. There was overwhelming evidence of Petrocelli's guilt apart from the admission of the murder weapon, primarily from Petrocelli's own testimony. Therefore, even if trial counsel was ineffective, the ineffectiveness did not prejudice the outcome of Petrocelli's case. In turn, appellate counsel and post-conviction counsel were not ineffective for failing to raise this issue.

Order Dismissing Appeal, Exhibit ZZ, p. 5 (ECF No. 36-1, p. 110).⁷

Petrocelli raised this claim as Ground 16 in his first amended petition in this action. *See* First Amended Petition (ECF No. 28), p. 15. This court dismissed that claim on procedural grounds. The court of appeals reversed that ruling, and remanded the claim for a determination either on other procedural grounds or on the merits. *See Petrocelli v. Angelone*, 248 F.3d 877, 887-88 (9th Cir. 2001).

This court agrees with the analysis of the Nevada Supreme Court. There is no conceivable way that the admission of the murder weapon into evidence prejudiced Petrocelli's defense. At trial,

⁷ As is discussed above, Petrocelli's claims are subject to pre-AEDPA standards. In this order, the court notes the state courts' rulings on Petrocelli's claims, but does not afford those rulings deference. The court reviews questions of law, and mixed questions of law and fact, de novo.

1 there was no question who killed Wilson, and there was no question what weapon was used. *See*
2 Petrocelli's Opening Statement, Exhibit P, pp. 5-14 (ECF No. 73-1, pp. 66-75).

3 The evidence showed that the victim, James Wilson, took Petrocelli for a test drive in Reno
4 in a Volkswagen pickup truck. *See* Testimony of Eddie Wilson, Exhibit M, pp. 60-72 (ECF No. 72-
5 1, pp. 51-63). Later that night, Petrocelli was walking in cold, snowy weather near the west shore of
6 Pyramid Lake, about 30 miles from Reno, when he asked a passing motorist for, and was given, a
7 ride to a small store. *See* Testimony of Don Dalton, Exhibit M, pp. 77-89 (ECF No. 72-1, pp. 68-
8 80). Petrocelli went into that store, appearing tired and cold, and asked for a ride to Reno. *See*
9 Testimony of Stanley Williams, Exhibit M, pp. 89-101 (ECF No. 72-1, pp. 80-92). A Pyramid Lake
10 game warden, who happened to be in the store, agreed to give Petrocelli a ride, took him out to look
11 for the motorcycle he said he wrecked, and then gave him a ride to Sparks. *See id.* In Sparks,
12 Petrocelli got into a taxi, and was driven to Reno, where he paid the taxi fare from a thick wad of
13 cash. *See* Testimony of Rodney Wilson, Exhibit N, pp. 122-133 (ECF No. 73, pp. 126-37). The
14 next day, the Volkswagen pickup truck was found near Pyramid Lake, not far from where Petrocelli
15 had been walking the night before. *See* Testimony of Stanley Williams, Exhibit M, pp. 89-101 (ECF
16 No. 72-1, pp. 80-92). There were bloodstains in the truck. *See id.*; *see also* Testimony of Richard
17 Ross, Exhibit M, pp. 101-29 (ECF No. 72-1, pp. 92-120); Testimony of Harold A. Hazard, Exhibit
18 N, pp. 16-63, 67 (ECF No. 73, pp. 20-67, 71). There were bullet holes in the roof, the passenger
19 side above the door, and the windshield, and there were .22 caliber bullet casings in the truck.
20 *See* Testimony of Richard Ross, Exhibit M, pp. 101-29 (ECF No. 72-1, pp. 92-120); Testimony of
21 Harold A. Hazard, Exhibit N, pp. 16-63, 67 (ECF No. 73, pp. 20-67, 71). Wilson's body was found
22 nearby, in a rocky crevice, covered with rocks and sagebrush. *See* Testimony of Richard Ross,
23 Exhibit M, pp. 101-29 (ECF No. 72-1, pp. 92-120); Testimony of Waldemar Eklof III, Exhibit M,
24 pp. 130-39 (ECF No. 72-1, pp. 121-30); Testimony of Vernon McCarty, Exhibit M, pp. 144-55
25 (ECF No. 72-1, pp. 135-46), and Exhibit N, pp. 1-10 (ECF No. 73, pp. 5-14). There was blood
26 around one of Wilson's front pockets; Wilson's back pockets were turned slightly inside out, and

1 were empty, and his wallet was missing. *See* Testimony of Vernon McCarty, Exhibit M, pp. 144-55
2 (ECF No. 72-1, pp. 135-46), and Exhibit N, pp. 1-10 (ECF No. 73, pp. 5-14). Wilson had been shot
3 three times: once in the neck, once in the heart, and once in the back of the head from a distance of
4 two to three inches. *See id.*

5 Petrocelli testified that he killed Wilson with his own .22 caliber pistol. *See* Testimony of
6 Tracy Petrocelli, Exhibit P, pp. 38-40 (ECF No. 73-1, pp. 99-101), pp. 69-70 (ECF No. 73-1, pp.
7 130-31), p. 89 (ECF No. 73-1, p. 150); *see also* Exhibit P, p. 11 (ECF No. 73-1, p. 72) (admission in
8 Petrocelli's opening statement that it was Petrocelli's gun that was used to kill Wilson: "He has a
9 gun on him and he takes it out, and"). Petrocelli claimed that he did not mean to kill Wilson –
10 that he did so by accident in the course of a dispute and struggle – but Petrocelli never contested that
11 he shot Wilson, and that he did so with his own .22 pistol. In light of the evidence at trial, especially
12 Petrocelli's own testimony, the admission of the murder weapon into evidence was unnecessary to
13 the proof of Petrocelli's guilt.

14 Petrocelli also testified that in October 1981 he killed his girlfriend, Melanie Barber, with the
15 same .22 pistol. *See* Testimony of Tracy Petrocelli, Exhibit P, p. 95 (ECF No. 73-1, p. 156).
16 Admission of the pistol into evidence was not necessary to this testimony. In light of Petrocelli's
17 testimony that he killed Barber and Wilson with the same gun, the admission of the gun into
18 evidence did not contribute anything to the prosecution's showing of the similarities of the two
19 killings.

20 Therefore, even assuming that the discovery of the handgun was improper, and assuming
21 counsel's performance, in failing to object to its admission into evidence, was unreasonable, there
22 was no violation of Petrocelli's constitutional right to effective assistance of counsel, because there
23 is no reasonable probability that, but for the admission of the handgun into evidence, the result of the
24 trial would have been different. Petrocelli was not prejudiced by his attorney's failure to object to
25 the admission of the handgun into evidence. The court will deny Petrocelli relief on Ground 6(c).
26

1 Grounds 6(d) and 13

2 In Ground 6(d), Petrocelli claims that his constitutional rights were violated “due to the
3 failure of trial counsel to provide reasonably effective assistance at the guilt/innocence phase of his
4 trial,” “for failing to object to the testimony of Melvin Powell.” Fourth Amended Petition, pp. 144,
5 160. Petrocelli claims that, after his arrest on April 19, 1982, he was interviewed by detectives at
6 the Las Vegas police department, and, in the course of that interview, the detectives violated his
7 rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). *Id.* at 160-63. He claims, in turn, that the
8 April 19, 1982, interview led investigators to Melvin Powell, and, therefore, his trial counsel should
9 have objected to Powell’s testimony. *Id.* at 163. In Ground 13, Petrocelli claims that his Fifth and
10 Sixth Amendment rights were violated as a result of the post-arrest interrogations. Fourth Amended
11 Petition, p. 248.

12 The Nevada Supreme Court ruled as follows:

13 Looking at the transcript of Petrocelli’s interrogation, it is arguable whether
14 he did indeed request counsel or whether he waived the right to have counsel present.
15 However, even if the failure to object to the admission of Petrocelli’s statements was
16 ineffective on the part of trial counsel, the requisite prejudice is not present.
Petrocelli testified at trial and admitted killing both the victim in this case and his
girlfriend in Washington. It is therefore highly unlikely that the outcome of
Petrocelli’s trial would have been different had Melvin Powell not testified.

17 Exhibit ZZ, pp. 6-7 (ECF No. 36-1, pp. 111-12).

18 Petrocelli raised these claims as Grounds 18, 19, 20, and 22 in his first amended habeas
19 petition in this action. See First Amended Petition (ECF No. 28), pp. 16-19. This court dismissed
20 these claims on procedural grounds. The court of appeals reversed that ruling, and remanded these
21 claims for a determination either on other procedural grounds or on the merits. *See Petrocelli v.*
22 *Angelone*, 248 F.3d 877, 887-88 (9th Cir. 2001).

23 Petrocelli acknowledges that “[b]efore the interview he was advised of his *Miranda* rights
24 and signed a statement that he understood them.” Fourth Amended Petition, p. 160. In addition, at
25 the beginning of the statement, Petrocelli was read his *Miranda* rights, and he stated that he
26 understood them. Exhibit J-1, “State’s Exhibit PPPP,” pp. 2-3 (ECF No. 71-1, pp. 19-20).

1 However, Petrocelli claims that his *Miranda* rights were violated because the interview was not
2 terminated when the following exchange occurred:

3 A [Petrocelli]: What I want to know is what's, you know. The only thing ...
4 see ... I don't know if you could even answer my question. But ... I'd like to sort of
5 know ... I mean ... you know. You'll get what you want, you know. I'm just saying
6 that I'd like to know what ... ah ... I mean because they got this other thing in
7 Washington.

8 Q [detective]: Um hum.

9 A.: And I'd sort of like to know what my ... lawyer wants me to do and ...
10 or what I should do or ... you know.

11 Q: Um hum.

12 A: I mean ... That's the only thing I just don't know. That's all. You
13 know ... I mean ah

14 Q: Well I ... I explained your rights to you

15 A: Um hum.

16 Q: ... and you understood your rights?

17 A: Um hum.

18 Q: Is that correct?

19 A: Um hum.

20 Q: ... What I don't understand is ah ... how when you indicated you knew
21 why we were down here and wanting to talk to you

22 A: I told the police ... like I said ... I said, "I'd sign anything you want.
23 You write it out the way you want it and I'd sign it."

24 Q: Why?

25 A: ... Because, you know, it's ah ... I mean that's what you want.

26 Q: Well, all we want's the truth, Tracy. I don't want anything that's not
there.

A: But ah ... I just ... and that's the only thing I didn't know, you know,
was how I ... you know ... I don't know a lot about the law, you know. But I mean

Q: I mean

A: You write it out and I'll sign it.

1 Q: Well, we don't do things like that. You know ... what we're talking to
2 you about ... was ah ... this murder up here. You indicated that you wanted to talk to
3 us. Ah ... if you didn't feel like talking or if you don't want to talk, contrary to
popular belief, we don't hold anybody down and make 'em talk to us.

4 A: ... I had in mind. I mean I'm telling you the truth, I ... like I told the
policeman I says ... "Whatever you fill out, I'll sign it."

5 * * *

6 A: Well, who's going to want me first? You know, Wash

7 Q: (Interrupts) We do. You're in custody with us.

8 A: Um hum.... See, I just ... I even have a ... part-time attorney and just to
9 answer questions for me.

10 Q: Is it ... what you're telling me is you don't want to answer any
questions without an attorney?

11 A: No. I just need to have something answered. That's all.

12 Q: Well, we don't have an attorney ... present with us right now. Like I
13 indicated before if at any time you don't want to ... answer any questions or make any
statements you don't have to. See, this is something that you're doing ah ... totally
14 voluntarily. Okay, we're not forcing you into ah ... doing anything. It's up to you. I
think it could do ... nothing but help you. Okay? I don't know if you need any kind
15 of help. I don't know if you've ever had any kind of help. But we need to find out ...
exactly what happened out there. I mean I ... I don't know what kind of struggle
16 there was in the car. I don't know what prompted this ... action. I mean, I wasn't
there. I don't know exactly ... what happened. I know pretty close, I but I don't
17 know exactly.... Would you feel more comfortable if we got a stenographer to write a
statement down for you to sign it?

18 A: ... If you'd ... a signed statement saying whatever you want, right?
19 Isn't that sufficient?

20 Q: No sir, it isn't.

21 Exhibit J-1, "State's Exhibit PPPP," pp. 12-13, 16-17 (ECF No. 71-1, pp.29-30, 33-34).

22 Later in the interview, Petrocelli told the investigators that he had stolen cars from
23 automobile dealers by taking them for test drives, and he described how he stole a vehicle in that
24 manner from a dealership in Oklahoma City called "Dub Peterson." *Id.* at pp. 20, 22-26 (ECF No.
25 71-1, pp. 37, 39-43). Petrocelli claims this led the investigators to Melvin Powell, who testified
26

1 about Petrocelli's Oklahoma City robbery. Fourth Amended Petition, p. 163; *see* Exhibit O, pp. 49-
2 61 (ECF No. 73-1, pp. 18-30) (testimony of Melvin Powell).

3 At Petrocelli's trial, Powell testified that he worked as a car salesman at Dub Richardson
4 Ford, in Oklahoma City. Exhibit O, p. 50, (ECF No. 73-1, p. 19). He testified that in the days
5 before February 10, 1982, Petrocelli approached him and expressed interest in a 1981 Datsun 280ZX
6 automobile. *Id.* at 50-52 (ECF No. 73-1, pp. 19-21). Petrocelli spoke with Powell on three or four
7 occasions, and took two test drives in the 280ZX. *Id.* at 52. According to Powell, Petrocelli came
8 into the dealership to take the second test drive on February 10, 1982. *Id.* at 53 (ECF No. 73-1, p.
9 22). Powell testified that, during the second test drive, when he suggested that Petrocelli turn the car
10 around and go back to see if they could make a deal, Petrocelli did not answer and continued
11 driving, heading out of town. *Id.* at 55 (ECF No. 73-1, p. 24). Powell testified that he then asked
12 Petrocelli what he was doing, and said, "Let's turn around and go back, and, you know, do some
13 business." *Id.* at 56 (ECF No. 73-1, p. 25). According to Powell, Petrocelli looked over at him and
14 said, "I don't want to hurt you, but I'm going to take your car." *Id.* Powell testified that he
15 responded that he didn't care if Petrocelli took the car, and asked to be let out. *Id.* He testified that
16 Petrocelli told him that he would have to take him out to where it would take him quite a while to
17 walk back. *Id.* Powell testified that he was afraid of Petrocelli, and did not resist. *Id.* Petrocelli
18 took Powell about twenty miles out of town. *Id.* On the way, according to Powell's testimony,
19 Petrocelli asked Powell if he had any money, and Powell said he had two or three dollars. *Id.* at 56-
20 57 (ECF No. 73-1, pp. 25-26). Powell testified that Petrocelli told Powell to give him that money,
21 but let him keep some change to use a telephone. *Id.* at 57. Powell testified that Petrocelli then let
22 him out of the car. *Id.* Powell testified that he never saw the car again. *Id.* On cross-examination,
23 Powell testified that Petrocelli called him the next day. *Id.* at 59 (ECF No. 73-1, p. 28). On redirect
24 examination, Powell testified that, in the course of that call the next day, Petrocelli asked if he was
25 okay, and told him he was leaving the car at a location near Erick, Oklahoma. *Id.* at 60 (ECF No.
26 73-1, p. 29). However, Powell testified that the car was never recovered. *Id.*

1 A suspect subject to custodial interrogation has a Fifth and Fourteenth Amendment right to
 2 consult with an attorney and to have an attorney present during questioning, and the police must
 3 explain this right to the suspect before questioning. *Miranda v. Arizona*, 384 U.S. 436, 469-73
 4 (1966). When an accused invokes his right to have counsel present during custodial interrogation,
 5 he may not be subjected to further questioning until counsel has been made available or the suspect
 6 himself reinitiates conversation. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). This
 7 “prophylactic rule [is] designed to prevent police from badgering a defendant into waiving his
 8 previously asserted *Miranda* rights.” *Michigan v. Harvey*, 494 U.S. 344, 350 (1990).

9 In *Davis v. United States*, 512 U.S. 452 (1994), the Supreme Court declined to extend the
 10 rule of *Edwards* to situations in which the suspect makes a vague or ambiguous reference to an
 11 attorney after previously waiving his *Miranda* rights. *Davis*, 512 U.S. at 459. The suspect in *Davis*
 12 explicitly waived his right to counsel, both orally and in writing, before the interrogation began;
 13 then, later, during the questioning, he said, “Maybe I should talk to a lawyer.” *Id.* at 454-55. The
 14 Court held that, under the circumstances, that was not an unambiguous invocation of the right to
 15 counsel, and the questioning did not have to stop:

16 The applicability of the “‘rigid’ prophylactic rule” of *Edwards* requires courts
 17 to “determine whether the accused *actually invoked* his right to counsel.” *Smith v.*
 18 *Illinois*, [469 U.S. 91, 95 (1984)] (emphasis added), quoting *Fare v. Michael C.*, 442
 19 U.S. 707, 719, 99 S.Ct. 2560, 2569, 61 L.Ed.2d 197 (1979). To avoid difficulties of
 20 proof and to provide guidance to officers conducting interrogations, this is an
 21 objective inquiry. See *Connecticut v. Barrett*, [479 U.S. 523, 529 (1987)].
 22 Invocation of the *Miranda* right to counsel “requires, at a minimum, some statement
 23 that can reasonably be construed to be an expression of a desire for the assistance of
 24 an attorney.” *McNeil v. Wisconsin*, [501 U.S. 171, 178 (1991)]. But if a suspect
 25 makes a reference to an attorney that is ambiguous or equivocal in that a reasonable
 26 officer in light of the circumstances would have understood only that the suspect
might be invoking the right to counsel, our precedents do not require the cessation of
 questioning. See *ibid.* (“[T]he likelihood that a suspect would wish counsel to be
 present is not the test for applicability of *Edwards*”); *Edwards v. Arizona*, *supra*, 451
 U.S., at 485, 101 S.Ct., at 1885 (impermissible for authorities “to reinterrogate an
 accused in custody if he has *clearly* asserted his right to counsel”) (emphasis added).

Rather, the suspect must unambiguously request counsel. As we have
 observed, “a statement either is such an assertion of the right to counsel or it is not.”
Smith v. Illinois, 469 U.S., at 97-98, 105 S.Ct., at 494 (brackets and internal quotation
 marks omitted). Although a suspect need not “speak with the discrimination of an
 Oxford don,” *post*, at 2364 [at 512 U.S. 476] (SOUTER, J., concurring in judgment),

1 he must articulate his desire to have counsel present sufficiently clearly that a
 2 reasonable police officer in the circumstances would understand the statement to be a
 3 request for an attorney. If the statement fails to meet the requisite level of clarity,
 4 *Edwards* does not require that the officers stop questioning the suspect. *See Moran v.*
Burbine, 475 U.S. 412, 433, n. 4, 106 S.Ct. 1135, 1147, n. 4, 89 L.Ed.2d 410 (1986)
 (“[T]he interrogation must cease until an attorney is present only [i]f the individual
 states that he wants an attorney”) (citations and internal quotation marks omitted).

5 *Davis*, 512 U.S. at 458-59.

6 In this case, as in *Davis*, before the April 19, 1982, interrogation began, Petrocelli was
 7 informed of, and waived, his *Miranda* rights, both orally and in writing. *See* Exhibit J-1, “State’s
 8 Exhibit PPPP,” pp. 2-3 (ECF No. 71-1, pp. 19-20); *see also* Fourth Amended Petition, p. 160
 9 (“Before the interview he was advised of his *Miranda* rights and signed a statement that he
 10 understood them.”).

11 Thereafter, during the questioning, Petrocelli made comments to the effect that he had
 12 questions he would “sort of” like to ask an attorney:

- 13 - “I’d sort of like to know what my ... lawyer wants me to do and ... or what I
 14 should do or ... you know.”
- 15 - “I mean ... That’s the only thing I just don’t know. That’s all. You know ... I
 mean ah”
- 16 - “But ah ... I just ... and that’s the only thing I didn’t know, you know, was
 17 how I ... you know ... I don’t know a lot about the law, you know. But I mean

- 18 - “See, I just ... I even have a ... part-time attorney and just to answer questions
 19 for me.”

20 Exhibit J-1, “State’s Exhibit PPPP,” pp. 12-13, 16-17 (ECF No. 71-1, pp.29-30, 33-34). Petrocelli
 21 never said that he wished to have counsel present for the questioning, and Petrocelli never said that
 22 he wished not to answer further questions before consulting a lawyer or without a lawyer present.
 23 Petrocelli did not make an unambiguous request for counsel.

24 Apparently seeking clarification, the investigator asked: “Is it ... what you’re telling me is
 25 you don’t want to answer any questions without an attorney?” And, Petrocelli answered: “No. I just
 26 need to have something answered. That’s all.” Exhibit J-1, “State’s Exhibit PPPP,” p. 16 (ECF No.

1 71-1, p. 33) (emphasis added). The investigator then noted that there was not an attorney present,
2 reiterated that “if at any time you don’t want to ... answer any questions or make any statements you
3 don’t have to,” and properly went on with the questioning. *Id.*

4 Because Petrocelli did not unambiguously request counsel, under *Davis* there was no
5 requirement that the police discontinue the questioning. There was no *Miranda* violation, and,
6 therefore, Petrocelli’s trial counsel was not ineffective for failing to object to Powell’s testimony on
7 the ground that it was the fruit of a *Miranda* violation.

8 Moreover, this court agrees with the Nevada Supreme Court that, even if, for the sake of
9 analysis, it is assumed that there was a *Miranda* violation on account of the investigators’ failure to
10 cease the interrogation after the exchange discussed above, there is no reasonable probability that,
11 but for counsel’s failure to object to Powell’s testimony on that basis, the result of Petrocelli’s trial
12 would have been different. *See Strickland*, 466 U.S. at 688; *see also id.* at 694.

13 It is undisputed that Petrocelli killed Wilson, and there was solid evidence, beyond Powell’s
14 testimony, that Petrocelli killed him maliciously, intentionally, wilfully, deliberately and with
15 premeditation, and in the course of a robbery. In light of the evidence, Petrocelli’s self-serving and
16 uncorroborated story – that the shooting happened accidentally, during a struggle resulting from a
17 dispute over the price of the truck – was not believable.

18 There is no controversy about who killed Wilson; Petrocelli testified that he killed Wilson.
19 *See* Testimony of Tracy Petrocelli, Exhibit P, pp. 38-41 (ECF No. 73-1, pp. 99-102). Petrocelli,
20 however, claimed in his testimony that the killing was an accident – that it happened after he pulled
21 out his gun, in the course of a dispute over the price of the truck he was test driving. *Id.* at 40. But
22 the circumstantial evidence belies Petrocelli’s version of the events.

23 The evidence showed that Petrocelli fired six shots, and three of those shots hit Wilson.
24 *See* Testimony of Harold A. Hazard, Exhibit N, pp. 31, 36 (ECF No. 73, pp. 36, 41); Testimony of
25 Vernon McCarty, Exhibit N, p. 2 (ECF No. 73, p. 6). One of those shots was to the back of
26 Wilson’s head from a distance of two to three inches. *See* testimony of Vernon McCarty, Exhibit N,

1 p. 2 (ECF No. 73, p. 6); Testimony of David Atkinson, Exhibit N, pp. 99-100 (ECF No. 73, pp. 103-
2 04); Testimony of William John Diamond, Exhibit N, pp. 139-43 (ECF No. 73, pp. 143-47).

3 After the shooting, Petrocelli did not report what happened to the police or to anyone else.
4 Instead, he took Wilson's body to a remote area about 30 miles from Reno, near Pyramid Lake, and
5 hid it in a rocky crevasse. Then, after getting the truck stuck and abandoning it, he lied about what
6 had happened to the people he encountered on his way back to Reno. *See* Testimony of Don Dalton,
7 Exhibit M, pp. 80-86 (ECF No. 72-1, pp. 71-77; Testimony of Stanley Williams, Exhibit M, pp. 90-
8 98 (ECF No. 72-1, pp. 81-89); Testimony of Rodney Wilson, Exhibit N, pp. 124-25 (ECF No. 73,
9 pp. 128-29).

10 When Wilson's body was found, his back pockets were turned slightly inside out, and were
11 empty, and his wallet was missing. *See* Testimony of Vernon McCarty, Exhibit M, pp. 144-55 (ECF
12 No. 72-1, pp. 135-46), and Exhibit N, pp. 1-10 (ECF No. 73, pp. 5-14). There were blood stains
13 around his front left pocket. *See* Testimony of William John Diamond, Exhibit N, p. 138 (ECF No.
14 73, p. 142). Petrocelli admitted that, after he killed Wilson, he took \$1300 from his wallet. *See*
15 Testimony of Tracy Petrocelli, Exhibit P, pp. 46-47 (ECF No. 73-1, pp. 107-08); *see also id.* at p.
16 121 (ECF No. 73-1, p. 182). Later that night, Petrocelli paid a taxi fare from a thick wad of cash.
17 *See* Testimony of Rodney Wilson, Exhibit N, pp. 124-26 (ECF No. 73, pp. 128-30).

18 In light of the evidence at trial, even excluding Powell's testimony, Petrocelli's claim that the
19 killing of Wilson was accidental was implausible. There is no reasonable probability that, but for
20 Powell's testimony, the result of Petrocelli's trial would have been different.⁸

21 Other than his *Miranda* argument, Petrocelli makes no colorable argument, and does not
22 suggest that he can make a factual showing, that his statements were given involuntarily, in violation
23 of the Fifth and Fourteenth Amendments. In considering the voluntariness of a confession, a court
24

25 ⁸ Petrocelli points out, in his briefing, that the prosecutor argued at trial that the Powell
26 testimony was the only, or the strongest, evidence of Petrocelli's intent to commit robbery. *See* Exhibit
M, pp. 157-63 (ECF No. 72-1, pp. 148-54). The court is not bound by those arguments of the
prosecutor. There is no reasonable probability that the jury would have come to any different
conclusion in this case without Powell's testimony.

1 “examines whether a defendant’s will was overborne by the circumstances surrounding the giving of
2 a confession.” *Dickerson v. United States*, 530 U.S. 428, 434 (2000) (citation and internal quotation
3 marks omitted); *Doody v. Ryan*, 649 F.3d 986, 1008 (9th Cir.2011). “The due process test takes into
4 consideration the totality of all the surrounding circumstances -- both the characteristics of the
5 accused and the details of the interrogation.” *Dickerson*, 530 U.S. at 434 (citations and internal
6 quotation marks omitted). The ultimate question is: “Is the confession the product of an essentially
7 free and unconstrained choice by its maker?” *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26
8 (1973) (citation omitted). Petrocelli does not articulate any colorable claim that his statements were
9 not voluntary, and he does not tie any such claim to any facts that he could establish. *See* Fourth
10 Amended Petition, pp. 248-51; Reply, pp. 88-102. Nor does Petrocelli articulate a colorable claim,
11 or point to any evidence supporting a claim, that there was a violation of his Sixth Amendment right
12 to counsel. *See id.*

13 The court will deny Petrocelli relief with respect to Grounds 6(d) and 13.

14 Ground 7(b)

15 In Ground 7(b), Petrocelli claims that his constitutional rights were violated “due to the
16 failure of trial counsel to provide reasonably effective assistance at the penalty phase of his trial,”
17 “for failing to properly object to evidence of a prior conviction, allowing the jury to find the
18 aggravating factor of a conviction of a felony involving the use of force.” Fourth Amended Petition,
19 pp. 164, 180.

20 At the penalty phase of the trial, the prosecution sought to prove that two aggravating
21 circumstances existed with respect to Wilson’s murder, such that Petrocelli was eligible for the death
22 penalty. *See* Closing Argument of Prosecution, Exhibit U, pp. 74-84 (ECF No. 75, pp. 77-87). The
23 aggravating circumstances asserted by the prosecution were that the murder was committed in the
24 course of a robbery (*see* NRS 200.033(4)), and that the murder was committed by a person
25 previously convicted of a felony involving the use or threat of violence (*see* NRS 200.033(2)(b)).
26 *See id.* With regard to the second of the alleged aggravating circumstances, the prosecution sought

1 to prove that Petrocelli had previously, in Washington, been convicted of a kidnapping involving the
2 use or threat of violence. *See id.* at 78-81; *see also id.* at 86, 89-90 (defense acknowledged in its
3 closing argument that the prosecution's basis for the alleged NRS 200.033(2) aggravating
4 circumstance was the Washington kidnapping conviction). Beyond Petrocelli's own admission that
5 he had been convicted of felony kidnapping in Washington, the prosecution introduced the
6 testimony of two witnesses, Maureen Lawler and Joan Bleeker, to prove that the kidnapping
7 involved the use or threat of violence. *See* Testimony of Maureen Lawler, Exhibit U, pp. 35-45
8 (ECF No. 75, pp. 38-48); Testimony of Joan Bleeker, Exhibit U, pp. 47-60 (ECF No. 75, pp. 50-63);
9 *see also* Testimony of Tracy Petrocelli, Exhibit R, p. 18 (ECF No. 74, p. 165) (admitting that he had
10 been previously convicted of felony kidnapping). The jury found both aggravating circumstances
11 alleged by the prosecution to exist. *See* Exhibit U, p. 98 (ECF No. 75, p. 101).

12 Petrocelli claims that his trial counsel was ineffective for "failing to properly object to
13 evidence of a prior conviction, allowing the jury to find the aggravating circumstance of a
14 conviction of a felony involving the use of force." *See* Fourth Amended Petition, p. 180. It appears
15 to be Petrocelli's position that the prosecution's proof of the prior felony aggravator was improper
16 because the conviction was of a degree of kidnapping that in Washington does not necessarily
17 involve use or threat of violence, and Petrocelli's counsel should have objected to the prosecution's
18 introduction of extrinsic evidence to show that the kidnapping did, in fact, involve the use or threat
19 of violence.

20 Petrocelli made this same claim in Ground 12 of his first amended habeas petition in this
21 action. *See* First Amended Petition (ECF No. 28), p. 13. That claim was denied by this court in the
22 order entered September 29, 1997. *See* Order entered September 29, 1997 (ECF No. 78), p. 18. The
23 court of appeals affirmed that ruling. *Petrocelli v. Angelone*, 248 F.3d 877, 889-92 (9th Cir. 2001).
24 To the extent that the claim made in Ground 7(b) of Petrocelli's fourth amended petition is the same
25 as the claim made in Ground 12 of his first amended petition -- that is, to the extent that the claim in
26 Ground 7(b) focuses on counsel's failure to object to evidence regarding the Washington kidnapping

1 -- it is foreclosed by the doctrine of law of the case. “Under the law of the case doctrine, a court is
2 generally precluded from reconsidering an issue that has already been decided by the same court, or
3 a higher court in the identical case.” *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir.1997).
4 “The doctrine is not a limitation on a tribunal’s power, but rather a guide to discretion.” *Id.* “A
5 court may have discretion to depart from the law of the case where: (1) the first decision was clearly
6 erroneous; (2) an intervening change in the law has occurred; (3) the evidence on remand is
7 substantially different; (4) other changed circumstances exist; or (5) a manifest injustice would
8 otherwise result.” *Id.* “Failure to apply the doctrine of the law of the case absent one of the
9 requisite conditions constitutes an abuse of discretion.” *Id.* Therefore, as this claim has been fully
10 adjudicated, the law of the case doctrine applies, and it precludes reconsideration of this claim.

11 There is another facet of Ground 7(b), however, as it is presented in Petrocelli’s fourth
12 amended petition. Petrocelli includes, in his statement of facts in support of Ground 7(b), a
13 discussion of his trial counsel’s advice regarding his decision to testify at the guilt phase of his trial,
14 and the effect his decision to testify had on the admission of evidence regarding the killing of
15 Melanie Barber. *See* Fourth Amended Petition, pp. 180-82. The court, though, sees no connection
16 between those matters and the admission of the testimony of Lawler and Bleeker at the penalty
17 phase of the trial to establish the nature of Petrocelli’s prior kidnapping conviction. Furthermore,
18 the admission of evidence regarding the killing of Melanie Barber had no impact on the aggravating
19 circumstances found by the jury; at the time of Petrocelli’s trial in Nevada, he had not been
20 convicted of murder for the Barber homicide, and that killing was not used as an aggravating
21 circumstance. Moreover, Petrocelli’s complaint about his counsel’s advice regarding his decision to
22 testify is separately set forth in Petrocelli’s fourth amended habeas petition as Ground 6(b), and that
23 claim has been dismissed. *See* Order entered March 23, 2010 (ECF No. 200), pp. 11-12 (dismissing
24 Ground 6(b) on the basis that the claim was raised in Petrocelli’s first amended petition, denied by
25 this court, and then abandoned by Petrocelli on appeal).

1 In short, whether Ground 7(b) is construed as a claim regarding Petrocelli's counsel's failure
 2 to object to evidence concerning the Washington kidnapping conviction, or as a claim regarding
 3 counsel's advice regarding Petrocelli's decision to testify at trial, or as both, the claim is not
 4 procedurally viable. The court will deny Petrocelli habeas corpus relief with respect to Ground 7(b).

5 Ground 7(f)

6 In Ground 7(f), Petrocelli claims:

7 Even if no single instance of ineffectiveness at either phase of the trial rises
 8 to the level of prejudice requiring a new trial, under the *Strickland* standards,
 9 ineffectiveness must be assessed in terms of the cumulative impact of all instances
 of deficient performance and prejudice.

10 Fourth Amended Petition, p. 186. Petrocelli incorporates in Ground 7f the facts and arguments he
 11 sets forth in all of Grounds 6 and 7. *Id.*

12 Two of Petrocelli's claims of ineffective assistance of counsel are pertinent to this
 13 cumulative error claim: the claims in Grounds 6(c) and 6(d). As is discussed above, with respect to
 14 Ground 6(c), the court assumes, for the purpose of this order, that Petrocelli's counsel acted
 15 unreasonably in not challenging the admission of the handgun into evidence at the guilt phase of his
 16 trial, but the court concludes that Petrocelli was not prejudiced by that evidence. As is also
 17 discussed above, with respect to Ground 6(d), the court finds that Petrocelli's *Miranda* rights were
 18 not violated in the April 19, 1982 interview, and, in addition and alternatively, the court finds that
 19 Petrocelli was not prejudiced by the testimony of Melvin Powell, which allegedly stemmed from the
 20 April 19, 1982, interview.

21 As is discussed above, the court sees no way that the admission of the handgun into evidence
 22 prejudiced Petrocelli – that evidence had no bearing on any contested factual issue in the case.
 23 *See* discussion, *supra*, pp. 8-11. That remains the conclusion of the court when the attorney error
 24 identified in Ground 6(c) is considered together with the attorney error considered in the alternative
 25 in Ground 6(d). There is no synergy between the handgun evidence and the Powell testimony; the
 26 two were unrelated. Because there was no conceivable prejudice to Petrocelli from the admission of

1 the handgun into evidence, and because the handgun evidence and the Powell testimony were
2 wholly unrelated and without any evidentiary synergy, the cumulative error analysis is no different
3 from the prejudice analysis of the attorney error considered in the alternative in Ground 6(d).
4 *See* discussion, *supra*, pp. 18-19.

5 The court finds, therefore, that, even if it is assumed that Petrocelli's *Miranda* rights were
6 violated in the April 19, 1982, interview, as asserted by Petrocelli in Ground 6(d), and even if that
7 error is considered together with the attorney error assumed for purposes of the analysis of
8 Ground 6(c), there is no reasonable probability that, but for counsel's errors, the result of Petrocelli's
9 trial would have been different. *See Strickland*, 466 U.S. at 688, 694. The alleged attorney errors
10 under consideration here did not have a substantial and injurious effect or influence on the jury's
11 verdict, and did not so infect the trial with unfairness as to make the resulting conviction a denial of
12 due process. *See Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993); *Donnelly v. DeChristoforo*,
13 416 U.S. 637, 643 (1974); *Chambers v. Mississippi*, 410 U.S. 284, 298, 302-03 (1973); *Parle v.*
14 *Runnels*, 505 F.3d 922, 926-27 (9th Cir.2007).

15 The court will deny Petrocelli habeas corpus relief with respect to Ground 7(f).

16 Ground 10

17 In Ground 10, Petrocelli claims that "the statutorily-mandated reasonable doubt instruction
18 unconstitutionally minimized the state's burden of proof and infected the trial and sentencing
19 process." Fourth Amended Petition, p. 197.

20 At Petrocelli's trial, the court instructed the jury as follows with regard to the definition of
21 "reasonable doubt":

22 A reasonable doubt is one based on reason. It is not mere possible doubt, but
23 is such a doubt as would govern or control a person in the more weighty affairs of
24 life. If the minds of the jurors, after the entire comparison and consideration of all
25 the evidence, are in such a condition that they can say they feel an abiding conviction
26 of the truth of the charge, there is not a reasonable doubt. Doubt, to be reasonable,
must be actual and substantial, not mere possibility or speculation.

1 See Exhibit D, Instruction No. 12 (ECF No. 70, p. 129).⁹ Citing *Cage v. Louisiana*, 498 U.S. 39
 2 (1990), Petrocelli argues that “this definition of ‘reasonable doubt’ creates a standard of proof which
 3 is below the standard of proof required by the constitution for the State to secure a conviction.”
 4 Fourth Amended Petition, p. 197. Petrocelli focuses his argument upon the second sentence – “It is
 5 not mere possible doubt but is such a doubt as would govern or control a person in the more weighty
 6 affairs of life” -- and on the last sentence – “Doubt to be reasonable, must be actual and substantial,
 7 not mere possibility or speculation.” *Id.* at 197-98.

8 Petrocelli presented this claim to the Nevada Supreme Court on the appeal in his second state
 9 habeas action. See Exhibit WW, pp. 32-33. The Nevada Supreme Court ruled as follows:

10 ... [Petrocelli] contends that the statutory definition of reasonable doubt contained in
 11 the jury instructions given at his trial violated his right to due process. He maintains
 12 that the language of the Nevada instruction is similar to a Louisiana instruction,
 13 language that was later declared unconstitutional by the United States Supreme Court
 14 in *Cage v. Louisiana*, 498 U.S. 39 (1990). However, this court has held that the same
 15 reasonable doubt standard used in Petrocelli’s trial does not violate due process.
 16 *Lord v. State*, 107 Nev. 28, 806 P.2d 548 (1991). In light of our holding in *Lord*,
 17 Petrocelli’s argument is meritless.

18 Order Dismissing Appeal, Exhibit ZZ, p. 7.

19 Respondents argue that this same claim was made as Ground 1 of Petrocelli’s first amended
 20 petition in this case, that the claim was denied in this court’s September 30, 1997, order, and that the
 21 court of appeals affirmed that ruling on appeal. See Answer, p. 61. Respondents argue that,
 22 therefore, the claim has been fully adjudicated and is barred by the law of the case doctrine. *Id.*
 23 However, this claim is not the same as the claim in Ground 1 of the first amended petition. Ground
 24 1 of the first amended petition concerned comments regarding the reasonable doubt standard made
 25 by the trial judge during jury voir dire. See First Amended Petition (ECF No. 28), p. 8. That is not
 26 the claim at issue here.

27 This claim, Ground 10 of the fourth amended petition, is much the same as Ground 25 of the
 28 first amended petition. See *id.* at 20. Ground 25 of the first amended petition was one of the claims

⁹ Between 1967 and 1991, this definition of reasonable doubt was codified at NRS 175.211.

1 remanded to this court from the court of appeals for further consideration. *See Petrocelli v.*
2 *Angelone*, 248 F.3d 877, 887-88 (9th Cir. 2001). Ground 10 is now properly before this court with
3 respect to its merits.

4 The claim in Ground 10 fails on its merits, however. The Ninth Circuit Court of Appeals has
5 held this same Nevada jury instruction constitutional, both before and after *Cage* was decided by the
6 Supreme Court. *See Ramirez v. Hatcher*, 136 F.3d 1209, 1214 (9th Cir.), *cert. denied*, 525 U.S. 967
7 (1998); *Darnell v. Swinney*, 823 F.2d 299, 302 (9th Cir.1987), *cert. denied*, 484 U.S. 1059 (1988).
8 Also, more recently, in a capital case subject to AEDPA standards, the Ninth Circuit Court of
9 Appeals ruled that the law of this circuit forecloses a claim such as this, and held the issue to be
10 unworthy of a certificate of appealability. *See Nevius v. McDaniel*, 218 F.3d 940, 945 (9th
11 Cir.2000). In view of *Ramirez*, *Darnell*, and *Nevius*, the court concludes that Ground 10 is without
12 merit. The court will deny Petrocelli habeas corpus relief with respect to Ground 10.

13 Ground 12

14 In Ground 12, Petrocelli claims that his rights under the Fifth and Sixth Amendments were
15 violated due to “the admission of testimony from Dr. Gerow, who presented psychiatric testimony
16 against the defendant based on communications made by the defendant during a court-ordered
17 psychiatric examination.” Fourth Amended Petition, pp. 220, 238; *see also, generally, id.* at 220-47.
18 In Ground 12, Petrocelli also claims that it was ineffective assistance of counsel for his appellate
19 counsel and his state post-conviction counsel to fail to claim violations of his Fifth and Sixth
20 Amendment rights, as well as the psychotherapist-patient privilege, on his direct appeal and in his
21 first and second state habeas actions. *Id.* at 238-44.

22 Petrocelli asserted a similar claim, without the ineffective assistance of counsel claims, in his
23 first amended petition in this action as Ground 26. *See* First Amended Petition (ECF No. 28), p. 20.
24 This court dismissed that claim on procedural grounds. The court of appeals reversed that ruling,
25 and remanded the claim for a determination either on other procedural grounds or on the merits. *See*
26 *Petrocelli v. Angelone*, 248 F.3d 877, 887 (9th Cir. 2001).

1 Petrocelli then asserted this claim in state court in his third state habeas action. Exhibit 26
2 (ECF No. 165, pp. 2-43). Petrocelli later filed a supplement to that petition. Exhibit 32 (ECF No.
3 165-3, pp. 80-93). The state district court held evidentiary hearings. Exhibits 29, 30, 31 (ECF No.
4 165-2, and ECF No. 165-3, pp. 2-78) (transcripts). The state district court “denied and dismissed”
5 the petition on April 14, 2006, rejecting this claim on its merits. Exhibit 36 (ECF No. 166, pp.
6 30-40). Petrocelli appealed, raising this claim before the Nevada Supreme Court. *See* Exhibit 38
7 (ECF Nos. 166-2, 166-3) (opening brief); Exhibit 39 (ECF No. 166-4) (answering brief); Exhibit 40
8 (ECF Nos. 166-5, 167) (reply brief). The Nevada Supreme Court affirmed on July 26, 2007.
9 Exhibit 41 (ECF No. 167-2, pp. 2-15). The Nevada Supreme Court addressed the merits of this
10 claim as follows:

11 Petrocelli next contends that even if reweighing is permissible, our analysis
12 should exclude consideration of Dr. Lynn Gerow’s testimony during the penalty
13 hearing as it violated doctor-patient privilege [footnote omitted] and his Fifth
14 Amendment right to remain silent. Even assuming this testimony was improperly
15 admitted, however, it has had no impact on our reweighing or harmless error analysis.
16 At the penalty hearing, after Petrocelli testified on his own behalf and the defense
17 introduced reports from psychiatrist Dr. John Chappel and psychologist Dr. Martin
18 Gutride, Dr. Gerow testified during the State’s rebuttal case. Dr. Gerow testified that
19 persons suffering from psychopathic personality, like Petrocelli, and who have a
20 history of violence tend to repeat violent acts and thus the propensity for further
21 violence is high. Both Dr. Chappel and Dr. Gutride diagnosed Petrocelli with
22 antisocial personality disorder and described him as dangerous to others.
23 Dr. Chappel offered a more positive prognosis than Dr. Gerow in terms of
24 Petrocelli’s response to treatment, concluding that treatment might prevent any
25 further homicidal outbursts of rage. Dr. Gutride, however, was less optimistic than
26 Dr. Chappel, concluding that Petrocelli’s ability to profit from mental health
treatment was questionable in light of the depth of his mistrust of others. Dr. Gerow
testified that he had not reviewed Dr. Gutride’s report but agreed with Dr. Chappel’s
diagnosis. [Footnote: We also cannot ignore that the jury heard other compelling
evidence of Petrocelli’s violent propensities during the guilt phase of his trial when
the State presented evidence that he had killed his girlfriend five months before
Wilson’s murder. Although this evidence could not have been alleged at that time as
an aggravating circumstance (because he had not yet been formally convicted of the
girlfriend’s murder), the jury could have properly considered it in exercising its
discretion to impose a death sentence *after* it had determined that Petrocelli was death
eligible, *i.e.*, [that] no mitigating circumstances were sufficient to outweigh one or
more aggravating circumstances.] Accordingly, because Dr. Gerow’s testimony was
essentially cumulative, we conclude that any error in admitting Dr. Gerow’s
testimony did not unduly prejudice Petrocelli.

1 Order of Affirmance, Exhibit 41, pp. 7-8 (ECF No. 167-2, pp. 8-9) (emphasis in original); *see also*
2 *id.* at 13 (ECF No. 167-2, p. 14) (“And, as we explained above, Petrocelli failed to show that the
3 admission of Dr. Gerow’s testimony unduly prejudiced him in light of other compelling evidence
4 demonstrating his future dangerousness.”).

5 First, the court finds no merit in Petrocelli’s claim to the extent it is based on his assertion
6 that his counsel in his first and second state habeas actions were ineffective. *See* 28 U.S.C.
7 § 2254(i) (“The ineffectiveness or incompetence of counsel during Federal or State collateral post-
8 conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.”).

9 Turning to Petrocelli’s claims that Dr. Gerow’s testimony violated his rights under the Fifth
10 and Sixth Amendments, this court agrees with the Nevada courts that, assuming Dr. Gerow’s
11 testimony should have been excluded, Petrocelli was not prejudiced. Petrocelli argues that
12 Dr. Gerow’s testimony “was the cornerstone of the prosecution’s argument of ‘future
13 dangerousness’ which in turn was the cornerstone of their argument for the death penalty.” Fourth
14 Amended Petition, pp. 220. There was, however, a great deal of evidence, aside from Dr. Gerow’s
15 testimony, indicating that Petrocelli was dangerous and not susceptible to treatment.

16 First, the jury saw the evidence regarding Petrocelli’s killing of Wilson, and Petrocelli’s
17 behavior immediately following that killing. Petrocelli did not report the shooting, and he did not
18 get help for Wilson; rather, Petrocelli drove some 30 miles out of Reno to a remote area near
19 Pyramid Lake and buried Wilson’s body in a rock pile. Petrocelli then lied to the people he came
20 into contact with about what he was doing at Pyramid Lake. Moreover, in the penalty phase of the
21 trial, the jury heard Petrocelli’s cold demeanor with respect to the killing in a recorded interview
22 with the police. *See* Exhibit U, pp. 46-47 (ECF No. 75, pp. 49-50).

23 The jury also heard an eyewitness, Lloyd Maloney, describe in detail Petrocelli’s killing of
24 his girlfriend, 18-year-old Melanie Barker, less than six months before he killed Wilson. *See*
25 Testimony of Lloyd Maloney, Exhibit R, pp. 54-62 (ECF No. 74-1, pp. 5-13). Maloney’s
26 description of Petrocelli’s killing of Barker included the following:

1 Q: What happened then?

2 A: He was dragging her backward out of the place. They started up the
3 hallway.

4 About that time the lady that I was sitting with, I shoved her around the
5 corner, and as I looked down the hallway again, she was beginning to fall for some
6 reason. I don't know. Maybe he had hit her.

7 Q: Without speculating. Just describe what you saw.

8 A: As she was going toward the floor, he was saying, "If you keep
9 screaming I will shoot you."

10 She didn't stop screaming. So, as she was going down he fired the weapon
11 once. It hit her in the leg. As she landed on the floor, he was turning.

12 The weapon went off again, and the third time he had both hands on the gun,
13 pointed directly at her head and fired the shot.

14 *Id.* at 56.

15 Furthermore, Maureen Lawler, Melanie Barker's mother, testified in the penalty phase of
16 Petrocelli's trial about Petrocelli's kidnapping of Barker about six months before he killed her, and
17 about a year before he killed Wilson. Exhibit U, pp. 35-45 (ECF No. 75, pp. 38-48). Lawler
18 testified that one night Barker did not return from her work as a waitress, and was missing for three
19 days. *Id.* at 38-39 (ECF No. 75, pp. 41-42). She testified that when Barker reappeared, she had
20 been "beaten on the face" and she was "hysterical." *Id.* at 39-40 (ECF No. 75, pp. 42-43); *see also*
21 Testimony of Joan Bleeker, Exhibit U, pp. 47-48 (ECF No. 75, pp. 50-51) (When Bleeker
22 encountered Barker, in a restroom at a gas station, Barker said "she was being kidnapped," "was
23 scared," and "was getting knocked around," and she asked Bleeker to get Petrocelli's license plate
24 number and call the police.); *see also* Testimony of Tracy Petrocelli, Exhibit U, p. 54 (ECF No. 75,
25 p. 57) (admitting that he hit Barker). Lawler testified that Barker told her that Petrocelli had
26 kidnapped her at gunpoint. Exhibit U, p. 40 (ECF No. 75, p. 43). Lawler testified that Barker told
her that during the kidnapping Petrocelli told her that "they would be picked up by a friend bringing
a seaplane on the river ... [a]nd some of his friends would do away with her." *Id.* Lawler also
testified that in a telephone conversation with Petrocelli, prior to the kidnapping of Barker, they had

1 a dispute about a wallet and keys that Petrocelli had left in a car, and Petrocelli threatened to “blow
2 [her] away.” *Id.* at 41-42 (ECF No. 75, p. 44-45).

3 The evidence of Petrocelli’s dangerousness also involved Petrocelli’s statements and actions
4 after the killing of Wilson. John J. Lukas was in jail with Petrocelli while Petrocelli was awaiting
5 trial, and he testified in the penalty phase of Petrocelli’s trial about conversations he had with
6 Petrocelli in jail. Exhibit U, pp. 22-35 (ECF No. 75, pp. 25-38). Lukas testified that Petrocelli
7 wanted him to help with an escape attempt, and threatened him. *Id.* at 26 (ECF No. 75, p. 29).
8 Moreover, Lukas testified as follows about what Petrocelli planned to do if he escaped:

9 Q: Would you state what Mr. Petrocelli said he was going to do after he
10 got out?

11 A: He was going to get rid of the snitch.

12 Q: And who was that?

13 A: Some girl in Vegas or something that he thought had pissed him off.

14 Q: Did he say what he was going to do to her?

15 A: Get rid of her.

16 Q: Did he say anything else?

17 A: That was about it.

18 Q: Did he have plans with respect to anyone else, Mr. Lucas?

19 A: He said he’d get rid of the DA and all that, you know.

20 *Id.* at 31 (ECF No. 75, p. 34).

21 In the defense case in the penalty phase of the trial, Petrocelli introduced the reports of two
22 psychiatrists and a psychologist regarding his mental status. Those reports spoke to Petrocelli’s
23 dangerousness.

24 Defense Exhibit 3, in the penalty phase of the trial, was a report by John Petrich, M.D., of a
25 psychiatric evaluation of Petrocelli, dated June 19, 1981, written while Petrocelli was in jail in
26

1 Washington awaiting trial on the kidnapping charges. Exhibit J3, pp. 3-8 (ECF No. 71-2, pp. 53-
2 58). In the report, Dr. Petrich stated:

3 The defendant's psychiatric diagnosis is that of polydrug abuse with special emphasis
4 on amphetamines. In addition, I strongly suspect that the defendant may have
5 recurrent depressive episodes which are behind his drug abuse. That is, the drug
abuse may in fact be an attempt at self-treatment for this recurrent depressive
condition.

6 *Id.* at 3 (ECF No. 71-2, p. 53). Later in the report, under the heading "Diagnosis," Dr. Petrich
7 reported Petrocelli's diagnosis as follows:

8 Polydrug abuse - amphetamines and alcohol.
9 Rule out manic depressive illness or cyclothymic personality disorder.

10 *Id.* at 6 (ECF No. 71-2, p. 56). With regard to the likelihood of Petrocelli committing acts of
11 violence in the future, Dr. Petrich's report states:

12 With special reference to violence on the part of the defendant, it appears that he does
13 admit, in periods of excitement, of making holes in the wall with his fists and has
struck Melanie three times during the course of their highly conflicted relationship.
14 He denies other episodes of violence and his history is free of significant criminal
behavior. He states he has never hurt anyone in a fit of violence nor used a weapon.
15 He does admit making angry threats toward Melanie because he perceived that she
was not understanding nor supportive of him.

16 *Id.* at 5 (ECF No. 71-2, p. 55). In this regard, the report also states:

17 With reference to the defendant's likelihood to commit further criminal acts or to be
18 dangerous to the public, I must state that with control of the mood swings and alcohol
and drug rehabilitation, he appears to present a minimal risk to the community.
19 However, I must emphasize that he would require an intensive treatment program to
achieve these goals.

20 *Id.* at 6 (ECF No. 71-2, p. 56). Of the three reports introduced into evidence by the defense,
21 Dr. Petrich's report was the most supportive of the defense position that Petrocelli's mental
22 condition might be susceptible to treatment, and that he may not present a danger of violence
23 in the future. However, there were two obvious factors that undermined the weight of Dr. Petrich's
24 opinions. First, Dr. Petrich's report was written about three months before Petrocelli killed Barker,
25 and about nine months before Petrocelli killed Wilson. In opining about Petrocelli's mental status,
26 Dr. Petrich did not have the benefit of knowing about those two killings, nor the statements and

1 conduct of Petrocelli with regard to them. Second, Dr. Petrich made clear that the goals of control
2 of Petrocelli's mood swings and alcohol and drug rehabilitation would require an intensive treatment
3 program. However, the jury heard that, following the kidnapping conviction, and before he killed
4 Barker and Wilson, Petrocelli had twice left a drug rehabilitation program, after only one day on
5 each occasion. On cross examination in the penalty phase of his trial, Petrocelli testified as follows:

6 Q: How long did you stay with the drug rehabilitation?

7 A: One day.

8 Q: Then you came to Reno, isn't that correct?

9 A: Yes.

10 Q: Then you were arrested at gunpoint at a bank in Sparks?

11 A: Yes.

12 Q: Then returned to the State of Washington?

13 A: Yes.

14 Q: Then placed back on probation by the judge?

15 A: Yes. I was put back on the drug program.

16 Q: How long did you stay the second time?

17 A: One day.

18 Exhibit U, p. 56 (ECF No. 75, p. 59). Because Dr. Petrich's report was written before Petrocelli
19 twice rejected the sort of treatment recommended by Dr. Petrich, and before Petrocelli killed Barker
20 and Wilson, his opinion that Petrocelli, with treatment, would pose minimal risk to the public,
21 carried little evidentiary weight.

22 Defense Exhibit 2, in the penalty phase of the trial, was a report by John N. Chappel, M.D.,
23 of a psychiatric evaluation of Petrocelli, dated July 20, 1982. Exhibit J3, pp. 9-13 (ECF No. 71-2,
24 pp. 59-63). Dr. Chappel's report includes portions graphically conveying Petrocelli's¹⁰ potential for
25 violence:

26 _____
¹⁰ "John Maida" was an alias used by Petrocelli.

1 Mr. Maida spent three years in the Marines. He denies any thoughts of killing anyone
 2 until he entered the service. His goal up to that time had been to play professional
 3 baseball. He was "scared of killing. But, they emphasized it until I believed I could."
 4 On one occasion a fellow marine kicked his bunk, "I pulled my gun and said I'll kill
 you." He was courtmartialed for this episode. In fights prior to being in the Marines
 Mr. Maida would regularly lose. However, in the Marines "I found I started enjoying
 it. I knew I could kill – if they pushed me."

5 Once when he was in Alaska he got into a fight with a man who was much bigger.
 6 He won that fight and afterwards the man told him that he had backed off when he
 became convinced that Mr. Maida would kill him if they continued. "People told me
 they could see death in my eyes."

7 * * *

8 The major disturbance at the present time is emotional. Mr. Maida is both depressed
 9 and angry. The depression is expressed through sobbing and tears. He had considered
 10 suicide several times, both in the jail in Seattle and in Washoe County, where he
 earlier tried to hang himself. His anger and rage are directed primarily at the police
 11 and the district attorneys in Seattle and Washoe County. He considers the Washoe
 County District Attorney as premeditating his murder. When his rage occurs Mr.
 12 Maida threatens to kill the prosecutor.

13 Exhibit J3, pp. 10, 12 (ECF No. 71-2, pp. 60, 62). Dr. Chappel wrote the following under the
 14 heading "Diagnostic Impression":

15 Impulse control disorder.

16 Antisocial personality disorder

17 On the basis of the above examination it is my opinion that Mr. Maida is legally
 18 competent to stand trial. He has a factual understanding of the charges against him.
 He has sufficient mental capacity to understand the difference between right and
 19 wrong and to be able to cooperate with counsel in preparation of his defense.

20 It is further my opinion that a more extensive evaluation of Mr. Maida might serve
 some useful purposes. First, it would be useful to him to have a better understanding
 of the reasons for his loss of impulse control and his reason for killing someone who
 21 was close to him. Second, if Mr. Maida is not sentenced to death and executed, it is
 my opinion that in his current state of mind he is very dangerous to those people to
 22 whom his rage is directed. A period of evaluation and a trial of treatment might serve
 a useful purpose in preventing any further homicidal outbursts of rage on his part.
 23 There is a third reason for having evaluation and treatment before his trial. In his
 present state of mind he is likely to display some of his impulsive and angry behavior
 24 in the court room. This could be damaging, prejudicial, and dangerous.

25 *Id.* at 12-13 (ECF No. 71-2, pp. 62-63). So, in essence, Dr. Chappel characterized Petrocelli as
 26 "very dangerous" and subject to "homicidal outbursts of rage," and supported that characterization

1 with detailed background information, but suggested that “[a] period of evaluation and a trial of
2 treatment *might* serve a useful purpose in preventing any further homicidal outbursts of rage on his
3 part.” *Id.* (emphasis added).

4 Defense Exhibit 1, in the penalty phase of the trial, was a report by Martin E. Gutride, Ph.D.,
5 of a psychological evaluation of Petrocelli, dated July 30, 1982. Exhibit J3, pp. 14-18 (ECF No. 71-
6 2, pp. 64-68). After setting forth background information about Petrocelli’s life, Dr. Gutride’s report
7 states that he believed Petrocelli to be “faking bad” in his responses to psychological testing. *Id.* at
8 17 (ECF No. 71-2, p. 67). The report continues:

9 The pattern of the client’s responses, however, point to some basic characteristics
10 which appear valid for him. Specifically, he is a very impulsive individual who
11 functions completely emotionally when upset. At such times, he does not exercise
12 any control or rational thinking processes. He is an angry person, with a high
13 potential for violence. He seems to view his life as a struggle against authority and
14 “the system.” He is unlikely to act within normal social conventions. The client is
15 very mistrustful of others and seems very much alone in the world. He has little sense
16 of connectiveness with parent figures, particularly mother. He may find it quite
17 difficult to establish and maintain positive heterosexual relationships. There are
18 indications the client may have a death wish and his history of suicide attempts, as
19 well as violence towards others, makes him a relatively high suicide risk at this time.

20 *Id.* at 17-18 (ECF No. 71-2, pp. 67-68). Dr. Gutride’s report concludes as follows:

21 The diagnostic impression based on history and his response style during this
22 evaluation is that of an antisocial personality with paranoid features. He is capable of
23 losing contact with reality when emotionally upset and behaving purely emotionally,
24 with little concern for what he’s doing. The personal distress he exhibited during the
25 interview seems genuine and the client may truly desire some mental health
26 treatment. His ability to profit from such treatment is questionable [due] to the depth
of this client’s distrust of others. He can be quite dangerous to others as well as
himself and treatment should be offered in a setting where the client can be closely
monitored.

Id. at 18 (ECF No. 71-2, p. 68). In his testimony in the prosecution’s rebuttal case, in the penalty
phase of the trial, Dr. Gutride reiterated that he felt that Petrocelli had been faking in his responses
to the testing, and he went on to testify as follows, regarding the nature of an antisocial personality
disorder:

Q: Does an unsocial personality in – have anything to do with being
insane or insanity?

1 A: It does not imply an individual is unable to think properly or conduct
2 themselves conventionally. It relates mostly to a style of living. Unsocial with
paranoid tendencies.

3 Exhibit U, p. 64 (ECF No. 75, p. 67). In short, Dr. Gutride found Petrocelli to be “quite
4 dangerous,” and “an angry person, with a high potential for violence,” and opined that Petrocelli’s
5 “ability to profit from ... treatment is questionable.” Exhibit J3, pp. 17-18 (ECF No. 71-2,
6 pp. 67-68).

7 Against this background, with respect to the evidence concerning Petrocelli’s potential
8 for future dangerousness, in response to the defense’s introduction into evidence of the reports of
9 Dr. Petrich, Dr. Chappel, and Dr. Gutride, the prosecution called Dr. Gerow to testify. Exhibit U,
10 pp. 65-69 (ECF No. 75, pp. 68-72). Dr. Gerow testified – consistent with the opinions of
11 Dr. Chappel and Dr. Gutride – that he diagnosed Petrocelli as having a psychopathic or antisocial
12 personality. *Id.* at 66 (ECF No. 75, p. 69). Dr. Gerow explained that the two terms, “psychopathic
13 personality” and “antisocial personality,” are synonymous. *Id.* Dr. Gerow testified as follows:

14 Q: Would you describe a psychopathic personality?

15 A: Everybody has a personality. A psychopathic personality is
16 fortunately, a rare personality. It’s someone who is very callous and selfish, someone
unreliable and irresponsible. It’s someone who cannot form ties to other people,
17 someone who is superficial in their relationship –

18 * * *

19 A: Someone who forms superficial relationships with other people
because they are unable to form strong ties or feel deeply about other people.

20 Q: What is the person’s ability to live within the law? How does that
21 person relate to society?

22 A: People with psychopathic personalities are repeatedly in trouble with
the law.

23 Q: What’s the reason?

24 A: The reasons primarily are that they don’t believe in the rules that
25 society set up that governs the rest of us. They ignore the rules and are therefore
constantly in trouble. The other reason is when they get in trouble they don’t learn
26 from it so they continue to get into trouble because the experience of punishment
doesn’t help us.

1 Q: Is there any treatment for a psychopathic personality?

2 A: There is no treatment at all. A psychiatrist doesn't treat the condition
because it's not treatable.

3 Q: Is it long-standing or does it go away?

4 A: It starts early in life, it gets considerably worse during the adolescent
5 years and doesn't go away. It persists throughout life.

6 Q: What's the violence potential of a psychopathic?

7 A: It varies among psychopaths but people who have this personality
8 problem, who have a history of violence, tend to repeat violent actions because they
9 don't learn from experience or punishment, so the propensity for further violence is
quite high.

* * *

10 Q: Is being a psychopathic, is that in your opinion, a mental disturbance?

11 A: Yes, it's a mental disturbance.

12 Q: Is it an emotional disturbance?

13 A; Yes, it's an emotional disturbance.

14 Q: For which there is no cure?

15 A: There is no cure.

16
17 *Id.* at 66-68 (ECF No. 75, pp. 69-71). It is notable that none of this testimony by Dr. Gerow relied at
18 all upon his examination of Petrocelli; rather, in this testimony, Dr. Gerow merely conveyed his
19 opinions about psychopathy and antisocial personality disorder, in general. This testimony was
20 proper, despite the arguable violations of Petrocelli's rights under the Sixth Amendment and vis-a-
21 vis the psychotherapist-patient privilege. The only testimony by Dr. Gerow that related his opinions
22 about psychopathy and antisocial personality disorder to Petrocelli, in particular, was the following:

23 Q: How does that relate to Mr. Petrocelli? You said you diagnosed him as
24 a psychopathic. How do all the things – the no cure, the callousness, how does that
apply to him?

25 A: I think that describes him quite well.

26 Q: Everything that you have of the individual –

1 A: Yes?

2 *Id.* at 68 (ECF No. 75, p. 71).

3 The prosecutor addressed the doctors' opinions about Petrocelli's mental status, in his
4 closing argument, as follows:

5 Number two. The murder was committed while the defendant was under the
6 influence of extreme mental or emotional distress. Now, all the doctors have said that
7 Mr. Petrocelli is an antisocial, also known as a psychopath, which means he is unable
8 – he will not live within society, will not live within the rules, does what he pleases,
9 victimizes, is callous and cool and manipulative, and does all these things, which of
10 course, we saw evidence of in this case. All three doctors have agreed. It's unusual
11 for doctors to agree. It's extremely unusual for doctors to agree. But they do in this
12 case and each one of them says, Dr. Gutride, that he is an angry person with a high
13 potential of violence. He seems to view his life as a struggle against authority and
14 such. He is unlikely to act within normal society's conventions. Dr. Gutride says, his
15 ability to profit from such treatment, in other words, treatment of this – Dr. Gerow
16 has said there is no treatment, he will be a psychopathic personality unfortunately.
17 “Very rare,” Dr. Gerow said. His ability to profit from such treatment is
18 questionable. He can be quite dangerous to us, to others. That's Dr. Gutride.

19 Dr. Chappel. Dr. Chappel is not consistent as to the date. He discusses, in his
20 opinion, the current state of mind as very dangerous to most people at whom his rage
21 is directed – and the antisocial personality. And we have one other report which I will
22 be getting back to. This other report – is a duplicate – of Mr. Petrocelli in Seattle, of
23 the kidnapping, and I commend it to you for great knowledge. That's the report on
24 which he got probation.

25 Remember what Mr. Petrocelli did with Mr. Gutride was in defect when he
26 said he was faking, -- faking it up -- being manipulative of the doctor. The doctor
27 goes on, selfish, antisocial personality. He was put on an alcohol and drug
28 rehabilitation, and appears to present a minimal risk to the community. To the rest of
29 this, it discusses, that he was placed in an alcohol rehabilitation center from which he
30 escaped, and first came to Reno, was sent back and placed back in the rehabilitation
31 center where he escaped the first date, and killed the victim of the kidnapping.

32 This report is not worth the paper it's written on. One, it's a year ago. Two,
33 three doctors here are able to see the true Tracy Petrocelli, and his aims, have said
34 that he is a psychopath and I submit to you that although, perhaps maybe if you
35 stretch the word and thought, that might be a mitigating circumstance because it
36 might be extreme mental or emotional disturbance. I would submit to you, implicit in
37 that is, there is treatment available for this person. What psychopath means,
38 essentially, is a mean, bad person who has never changed and who will continue to
39 victimize.

1 Exhibit U, pp. 82-84 (ECF No. 75, pp. 85-87).¹¹ The prosecutor revisited this issue in his rebuttal
2 argument:

3 When you have been diagnosed by three doctors as being a psychopath,
4 callous, a cold and manipulative killer – an affliction – like psycho, a psychotic,
5 where you’re insane, but an affliction is not a psychopath, a psychopathic killer,
6 which is what Tracy Petrocelli is. It’s a perversion of the language and a
7 humanitarian spirit in the mitigating circumstances, is called being a person who will
8 continue to kill, a person who will continue to rob and will continue to steal because
9 he just doesn’t give a darn about other people. He’s callous, insensitive, and selfish.
10 It’s a perversion of the state statutes, it’s a perversion of the word mitigating, to call
11 that an affliction, and to put Tracy Petrocelli in the same group of people who need
12 help, mentally ill people.

13 Mr. Wishart [defense counsel] made reference to the fact that Dr. Chappel
14 talked about a treatment plan and that Dr. Gerow at all talks about a treatment plan
15 too, and draws of that that Melanie Barker is dead and James Wilson is dead, but
16 reads carefully within what Dr. Chappel says, an excellent psychiatrist, he thinks he
17 is terrible here – he says, if placed under sentence of death and executed, then it’s my
18 opinion the current state of mind, that he is dangerous to most people who are in the
19 direction of his rage. That a period of evaluation and a time of treatment might serve
20 a reasonable purpose. It might serve a purpose in preventing more murders. Do we
21 take that chance? By the way, what do we say? And this is a concern to other
22 prisoners in prison with Mr. Petrocelli when we say, “Here is Mr. Petrocelli to spend
23 some years among you; he is a homicidal (sic) psychopathic, dangerous to those at
24 whom his rage is directed.”

25 If he gets some treatment we might be able to prevent anymore murders –
26 might – what do we say to them?

Dr. Gutride, “His ability to profit from treatment is questionable due to the
depth of this client’s distrust of others.” He can be quite dangerous to others. As well
as, also, even if treatment should be offered, if it is, because these are doctors, all
within a setting where the clients can be closely monitored so he – so he doesn’t kill
anyone, is what it means. That’s me – not the doctor – so he doesn’t kill anyone. He
isn’t likely, say the doctors, to act within normal social conventions. That’s stated
unqualified there. And we can go to Dr. Gerow. Ladies and gentlemen, that he says
he is mentally sick could be confused in mitigating, but to call Tracy Petrocelli a sick
man – because sick implies an ability to be cured but the sad and terrifying fact is he
will continue to do this.

* * *

There is the statement he will not learn from punishment. He will not learn, he cannot
learn.

¹¹ Dr. Gutride’s name and Dr. Chappel’s name are misspelled in parts of the transcript. Those misspellings are corrected here.

1 *Id.* at 92-94 (ECF No. 75, pp. 95-97). The closing argument of the prosecutor illustrated that
2 Dr. Gerow's opinions did not stand out appreciably from, or add significantly to, the opinions of
3 Drs. Chappel and Gutride.

4 If, as is here assumed, the testimony of Dr. Gerow violated Petrocelli's rights, the violation
5 would justify overturning Petrocelli's death sentence only if Petrocelli could establish that the error
6 "“had substantial and injurious effect or influence in determining the jury's verdict.”” *Brecht v.*
7 *Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776
8 (1946)); *see also Pizzuto v. Arave*, 280 F.3d 949, 970 (2002) (applying harmless error analysis to
9 Fifth and Sixth Amendment violations, for using “uncounseled, non-Mirandized statements” against
10 capital defendant). The court finds that Petrocelli has not made any such showing. Dr. Gerow's
11 testimony was largely academic, in that, for the most part, it did not focus on Petrocelli specifically,
12 but rather consisted mainly of his opinions about psychopathy and antisocial personality disorder in
13 general. Furthermore, Dr. Gerow's testimony was not so divergent from the testimony of Drs.
14 Chappel and Gutride so as to significantly affect the outcome of the trial. Moreover, there was
15 ample evidence, aside from the testimony of Dr. Gerow, that Petrocelli would pose a danger to
16 others in the future: the evidence of Petrocelli's killing of Wilson and Petrocelli's behavior
17 immediately following that killing; Lloyd Maloney's testimony about Petrocelli's killing of
18 18-year-old Melanie Barker less than six months before he killed Wilson; the testimony of Maureen
19 Lawler, Barker's mother, about Petrocelli's kidnapping of Barker about a year before Wilson's
20 murder; Lawler's testimony that, in a telephone conversation with Petrocelli prior to his kidnapping
21 of Barker, Petrocelli threatened to “blow [her] away;” the testimony of John J. Lukas, who had been
22 in jail with Petrocelli while Petrocelli was awaiting trial, that Petrocelli wanted him to help with an
23 escape attempt, and threatened him; Lukas' testimony that Petrocelli told him that after his escape he
24 planned to “get rid of” a woman he considered a snitch, and planned to also “get rid of” the district
25 attorney; Dr. Petrich's opinion that Petrocelli would require “intensive treatment” in order to present
26 minimal danger to the community; Petrocelli's testimony that he twice left drug treatment after one

1 day; Dr. Chappel's opinion that if Petrocelli "is not sentenced to death and executed, it is my opinion
2 that in his current state of mind he is very dangerous to those people to whom his rage is directed;"
3 Dr. Gutride's opinion that Petrocelli's ability to profit from treatment "is questionable [due] to the
4 depth of [his] distrust of others," and that "he can be quite dangerous to others as well as himself and
5 treatment should be offered in a setting where the client can be closely monitored." In view of the
6 nature of Dr. Gerow's testimony, and in view of the other evidence regarding Petrocelli's capacity
7 for violence, the court finds that Petrocelli has not shown that the testimony of Dr. Gerow had a
8 substantial and injurious effect or influence in determining the jury's verdict.

9 With respect to Petrocelli's related claims of ineffective assistance of his appellate counsel,
10 for failing to assert his claims regarding the testimony of Dr. Gerow on direct appeal, a petitioner
11 claiming ineffective assistance of counsel must demonstrate that "there is a reasonable probability
12 that, but for counsel's unprofessional errors, the result of the proceeding would have been different."
13 *Strickland*, 466 U.S. at 688, 694. "A reasonable probability is a probability sufficient to undermine
14 confidence in the outcome." *Id.* at 694. Petrocelli has not shown that there is a reasonable
15 probability that, had the claims regarding Dr. Gerow been raised on appeal, the outcome in state
16 court would have been different.

17 The court will deny Petrocelli habeas corpus relief with respect to Ground 12.

18 Certificate of Appealability

19 This is a final order adverse to the petitioner. Therefore, Rule 11 of the Rules Governing
20 Section 2254 Cases in the United States District Courts mandates that this court must issue or deny a
21 certificate of appealability. *See* 28 U.S.C. § 2253(c); Rule 11(a), Rules Governing Section 2254
22 Cases in the United States District Courts; Fed. R. App. P. 22(b).

23 The standard for the issuance of a certificate of appealability requires a "substantial showing
24 of the denial of a constitutional right." 28 U.S.C. §2253(c). The Supreme Court has interpreted
25 28 U.S.C. §2253(c) as follows:
26

1 Where a district court has rejected the constitutional claims on the merits, the
2 showing required to satisfy § 2253(c) is straightforward: The petitioner must
3 demonstrate that reasonable jurists would find the district court's assessment of the
4 constitutional claims debatable or wrong. The issue becomes somewhat more
5 complicated where, as here, the district court dismisses the petition based on
6 procedural grounds. We hold as follows: When the district court denies a habeas
petition on procedural grounds without reaching the prisoner's underlying
constitutional claim, a COA should issue when the prisoner shows, at least, that
jurists of reason would find it debatable whether the petition states a valid claim of
the denial of a constitutional right and that jurists of reason would find it debatable
whether the district court was correct in its procedural ruling.

7 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also James v. Giles*, 221 F.3d 1074, 1077-79
8 (9th Cir.2000).

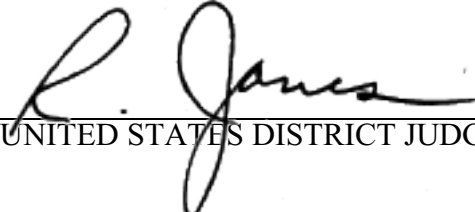
9 The court finds that, applying these standards, a certificate of appealability is warranted with
10 respect to Grounds 6(d), 12, and 13, of Petrocelli's fourth amended habeas petition. The court will
11 grant a certificate of appealability as to those claims. The court declines to issue a certificate of
12 appealability for Petrocelli's remaining claims.

13 **IT IS THEREFORE ORDERED** that petitioner's fourth amended petition for writ of
14 habeas corpus (ECF No. 162) is **DENIED**.

15 **IT IS FURTHER ORDERED** that petitioner is granted a certificate of appealability with
16 respect to Grounds 6(d), 12, and 13 of his fourth amended petition for writ of habeas corpus.

17 **IT IS FURTHER ORDERED** that the Clerk of the Court shall enter judgment accordingly.
18

19 Dated this 8th day of October, 2013.
20

21 
22 UNITED STATES DISTRICT JUDGE
23
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26